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CHARLES E. HUGHES, JR.

Supreme Court of the United States

OCTOBER TERM, 1942

No. 555

COLUMBIA BROADCASTING SYSTEM, INC.,

Appellant,

v.

THE UNITED STATES OF AMERICA, FEDERAL
COMMUNICATIONS COMMISSION and MUTUAL
BROADCASTING SYSTEM, INC.,

Respondents.

MOTION FOR TEMPORARY RESTRAINING ORDER,
NOTICE OF MOTION AND AFFIDAVIT IN
SUPPORT OF MOTION

CHARLES E. HUGHES, JR.,

1 Wall Street,

New York, N. Y.

Counsel for Appellant.



Supreme Court of the United States

OCTOBER TERM, 1942

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Appellant,

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THE UNITED STATES OF AMERICA, FEDERAL
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No. 555

MOTION FOR TEMPORARY RESTRAINING ORDER

Upon the annexed affidavit of Paul W. Kesten, sworn to February 8th, 1943, the complaint and all the affidavits and other papers filed herein and set forth in the transcript of record on this appeal, and all the proceedings heretofore had herein, the appellant moves this Court for an order suspending, and restraining the operation, enforcement or execution of the order of the Federal Communications Commission, one of the respondents herein, in Docket No. 506C, made May 2, 1941, as amended October 11, 1941, the order involved on said appeal, until ten days after the filing in the District Court of the mandate upon this Court's decision on said appeal; and for such other and further relief as to this Court may seem just.

Dated, February 8th, 1943.

CHARLES E. HUGHES, JR.,
1 Wall Street,
New York, N. Y.,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1942

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

THE UNITED STATES OF AMERICA, FEDERAL
COMMUNICATIONS COMMISSION and
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No. 555

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that the above motion will be submitted to the Court at the Courthouse of the Supreme Court of the United States, Washington, D. C., on the day on which the appeal herein is called for argument, at 12 o'clock noon on that day or as soon thereafter as said motion can be submitted.

Dated, February 8th, 1943.

CHARLES E. HUGHES, JR.
1 Wall Street,
New York; N. Y.
Counsel for Appellant.

To: *

CHARLES FAHY, Esq.,
Solicitor General,
Department of Justice,
Washington, D. C.

CHARLES R. DENNY, Esq.,
General Counsel,
Federal Communications Commission,
Washington, D. C.

LOUIS G. CALDWELL, Esq.,
Counsel for Mutual Broadcasting System, Inc.,
Washington, D. C.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1942

COLUMBIA BROADCASTING SYSTEM, INC.,
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No. 555

AFFIDAVIT IN SUPPORT OF MOTION

- UNITED STATES OF AMERICA,
- SOUTHERN DISTRICT OF NEW YORK,
- CITY, COUNTY AND STATE OF NEW YORK; } ss.:

PAUL W. KESTEN, being duly sworn, deposes and says:

I am Vice-President and General Manager of Columbia Broadcasting System, Inc., the appellant herein.

This is an appeal from a district court decree dismissing a suit by appellant to set aside, annul and permanently enjoin the enforcement of orders of the Federal Communications Commission (hereinafter called the "Commission") promulgating regulations applicable to radio stations engaged in chain or network broadcasting. For a description of the suit I respectfully refer the Court to the Statement in appellant's brief on this appeal.

The object of appellant's annexed motion, in support of which this affidavit is made, is to restrain enforcement of the regulations for an appropriate period after April 1, 1943 or the decision of this Court on this appeal, whichever is earlier. The District Court on November 16, 1942, entered an order accompanying its opinion rendered on that

date restraining enforcement of the regulations until February 1, 1943, or the argument of the appeal, whichever was earlier (R. 495).

Following the allowance of the appeal, the Commission was requested to enter into a stipulation which would suspend the orders promulgating the regulations until ten days after the determination of this appeal or the termination of this term of this Court, whichever should occur earlier. The Commission refused to enter into such a stipulation, but on January 20, 1943, by telegram, advised the appellant as follows:

"The Commission today entered the following minute: Quote the Commission today suspended until April 1, 1943, or the date of the decision by the Supreme Court of the United States in cases Nos. 554 and 555, whichever is earlier, the effectiveness of the Commission's order of May 2, 1941 in Docket No. 5060, as last amended October 11, 1941. Unquote."

The present motion was made necessary by the failure of either the District Court's temporary restraining order or the minute quoted in the telegram referred to above to provide appellant with protection from enforcement of the regulations for the period from April 1, 1943 until the decision of this appeal, if the appeal is not decided prior to April 1, 1943, and for a reasonable period after the decision of the appeal.

I respectfully submit that, for the following reasons, extension of the restraint upon enforcement of the regulations for ten days after the filing in the District Court of the mandate upon this Court's decision on the appeal would be appropriate in this case, regardless of whether the decision below is reversed or affirmed (*Board of Trade of the City of Chicago v. Clyne*, 260 U. S. 704, 262 U. S. 1).

If the decision below is reversed, it is clear that appellant should be protected by temporary restraining order and injunction until final determination of the action.

The reasons for the granting of such relief as is requested herein are set forth in the findings of fact and conclusions of law upon which the restraining order of the District Court was based as follows (R. 494-495):

"FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. That if the Federal Communications Commission, pending the plaintiff's appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; the plaintiff will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two and one half months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiff arising from enforcement, if the conditions mentioned in the First Finding exist.

That the plaintiff is entitled to a stay pending its appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Com-

mission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of February, 1943, whichever is earlier."

Facts amply supporting these findings and conclusions as to appellant's right to a stay pending the appeal are fully set forth in the affidavits of William S. Paley, verified February 25, 1942 (which was included in the record (pp. 474-478) before this Court in *Columbia Broadcasting System, Inc. v. United States of America, et al.*, October Term, 1941, No. 1026) and October 30, 1941 (R. 219, 245-248), and the affidavits of Herbert V. Akerberg, verified October 29, 1941 (R. 255-280) and January 5, 1942 (R. 301, 303-310), to which I respectfully refer the Court in lieu of a repetition of such facts in this affidavit. The danger of irreparable injury to Columbia if enforcement of the regulations is not restrained is as great now as it was when those affidavits were made.

If the decision below is affirmed, appellant should be given a reasonable opportunity to make whatever arrangements are necessary with its 115 affiliated stations.

WHEREFORE appellant prays that this Court enter an order granting the relief set forth in the accompanying motion.

PAUL W. KESTEN

Subscribed and sworn to before me
this 8th day of February, 1943.

JAMES D. McCUALEY

Attorney and Counsellor-at-Law
Office Address:—One Wall St., N. Y. City
Residing in N. Y. Co. No. 5, Reg. No. 3 Mc 169
Cert. filed in Kings Co. No. 2, Reg. No. 3004
Cert. filed in Queens Co. No. 54, Reg. No. 7981 A
Commission Expires March 30, 1943

[NOTARIAL SEAL]